

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MICHAEL KARNUTH,	:	CIVIL ACTION
	:	
v.	:	NO. 03-742
	:	
RODALE, INC.	:	

Diamond, J.

March 30, 2005

MEMORANDUM

Plaintiff Michael Karnuth brings this class action, alleging that Defendant Rodale, Inc. -- a book and magazine publisher -- violated state and federal statutes by enrolling him and others in an unsolicited book program. I deny Karnuth's motion for class certification without prejudice.

BACKGROUND AND PROCEDURAL HISTORY

On February 25, 2003, Karnuth filed his Original Complaint, alleging that in 2001 he was a subscriber to Rodale's "Men's Health" magazine. (Compl. at ¶ 1). Karnuth further alleged that simply because he was a subscriber, Defendant began sending Plaintiff unsolicited books and then demanded payment. (*Id.*). Karnuth claimed he received two unsolicited books -- the first "sometime in 2001," and the second in December 2001. (*Id.* at ¶¶ 7-10). Karnuth emphasized that Rodale sent the books to "Plaintiff and others without their prior consent." (*Id.* at ¶ 1). He alleged that he unwillingly paid Defendant for the first book to "get them off his back," and to preserve to his credit rating. (*Id.* at ¶ 9).

In his Original Complaint, Karnuth charged that Defendant violated the Postal Reorganization Act, Pennsylvania's Unsolicited Merchandise Act, Pennsylvania's Unfair Trade

Practices and Consumer Protection Law, and similar provisions in other states. See 39 U.S.C. § 3009; 73 P.S. § 2001; 73 P.S. §§ 201-2 et seq.

On May 6, 2003, Karnuth moved to certify a class of “all persons who, *without prior consent*, received books and other products from Defendant and an invoice for payment for such books and products,” as well as a subclass composed of “all members of the class who paid, in part or whole, the invoices for such books and products for personal, family, or household purposes.” (Id. at ¶ 15) (emphasis added). On July 3, 2003, the Honorable Franklin Van Antwerpen ruled that Karnuth failed to meet the numerosity requirement of Fed. R. Civ. P. 23(a)(1), and noted that Defendant had “raised the possibility that the books sent to Karnuth were not in fact unsolicited.” Karnuth v. Rodale, Inc., 2003 U.S. Dist. LEXIS 12095, *8-10 (E.D. Pa. 2003). Judge Van Antwerpen observed:

In this case, Rodale has alleged that unsolicited books were not sent to Karnuth, or to any other individuals for that matter. To support this allegation, Rodale has offered a compelling explanation with exhaustive detail regarding an annual enrollment program with a negative option feature. It also has provided an affidavit from Gregg Michaelson, Vice President, Publisher Direct Response Books for Rodale, Inc., confirming many of the details. Karnuth on the other hand has completely failed to acknowledge the existence of an alleged book that he affirmatively requested and for which he paid.

Id. at *9-10. Judge Van Antwerpen postponed ruling on Karnuth’s certification motion to allow the parties to resolve these discrepancies. On September 17, 2004 (almost fifteen months later), Karnuth moved to amend his Complaint to correct the discrepancies noted by Judge Van Antwerpen. (September 10, 2004 Order). I granted Karnuth’s motion over Rodale’s vigorous objection. (November 19, 2004 Order).

In contrast to his Original Complaint, Karnuth alleged in his Amended Complaint that in

September 2000, he returned to Defendant a “One Shot Order Card,” by which he agreed to preview a copy of a book entitled Sex, A Man’s Guide. (Amended Compl. at ¶¶ 7-8). The order card provided that if Karnuth did not return the book (at Defendant’s expense) within 21 days, he would be required to pay for it. (Id.). Karnuth kept the book and sent Rodale a \$39.65 check in full payment. (Id. at ¶ 10). In his Original Complaint, Karnuth made no mention whatsoever of this first book, nor did he disclose that he ordered and payed for the book. Through these glaring omissions, Karnuth created the false impression in his Original Complaint that the 2001 book was the first book Rodale sent him.

By ordering Sex, A Man’s Guide, Karnuth enrolled in a program that would automatically provide him each year with one of Defendant’s books; Karnuth could preview the book for 21 days without cost. (Id.). Accordingly, Defendant mailed Karnuth the two additional books described in Karnuth’s first Complaint --Report 2001: A Man’s Guide to Women; and Report 2002: A Man’s Guide to Women. (Id. at ¶¶ 12-17). These new facts belie Karnuth’s prior allegation that “[a]t no time either before or after Defendant sent Plaintiff and the class the 2001 and 2002 unsolicited books did Plaintiff request or consent to the mailing or sending to him of the subject books.” (Compl. at ¶24.).

In his Amended Complaint, Karnuth alleges that Rodale’s annual program violates the same statutes cited in his Original Complaint. See 39 U.S.C. § 3009; 73 P.S. § 2001; 73 P.S. §§ 201-2 et seq. Karnuth asks me to certify a class of “all persons who are or have been enrolled in Rodale’s Annual Programs and received books from Rodale and invoices for payment of such books, within 6 years preceding the filing of Plaintiff’s Class Action Complaint.” (Amended Compl. at ¶ 36). Karnuth also asks me to certify a subclass, defined as “all members of the class who paid, in part or

whole, the invoices for such books for personal, family or household purposes.” (Id.).

LEGAL STANDARDS

To obtain class certification, a plaintiff must satisfy all the prerequisites of Rule 23(a), and fulfill at least one of the requirements of Rule 23(b). See Georgine v. Amchem Products, Inc., 83 F.3d 610, 624 (3d Cir. 1996), aff’d, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); Nelson v. Astra Merck, Inc., 1998 U.S. Dist. LEXIS 16599 (E.D. Pa. 1998). As the party seeking certification, the plaintiff has the burden of proving that the class should be certified. See Freedman v. Arista Records, 137 F.R.D. 225, 227 (E.D. Pa. 1991) (citing Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974)).

In determining whether to certify a class, courts must accept as true all substantive allegations in the complaint. See Blacki v. Barrack, 524 F.2d 891, 901 n. 17 (9th Cir. 1975), cert. denied, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed. 2d 75 (1976); see also Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 209 (E.D. Pa. 2000); Steward v. Associates Consumer Discount Co., 183 F.R.D. 189, 193 (E.D. Pa. 1998). Courts may look beyond the four corners of the complaint for purposes of class certification, but may not consider “whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits.” Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed. 2d 732 (1974) (internal quotations omitted).

DISCUSSION

Karnuth’s Misleading Original Complaint Precludes Him From Adequately Representing Absent Class Members

To certify, I must conclude that “the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4). To make such a determination, I must find that

the class members do not have interests that are antagonistic to each other. Savino v. Computer Credit, Inc., 173 F.R.D. 346, 353 (E.D.N.Y. 1997) aff'd in part, vacated on other grounds, 164 F.3d 81 (2d Cir. 1998). Courts may deny class certification when the class representative is subject to a unique defense. J.H. Cohn & Co. v. American Appraisal Associates, Inc., 628 F.2d 994, 998-999 (7th Cir. 1980).

Where the proposed representative's credibility is subject to attack, unique defense problems are presented. See, e.g., Kline v. Wolf, 702 F.2d 400, 403 (2d Cir. 1983). Accordingly, where a class representative's credibility is in serious question, class certification may be denied. Id. at 402-03; Lerch v. Citizens First Bancorp, Inc., 144 F.R.D. 247, 251 (D.N.J. 1992). A proposed representative's credibility problem could divert the jury's "attention from the substance of the basic claim" and thus harm "the remaining class members." Kline v. Wolf, 88 F.R.D. 696, 700 (E.D.N.Y. 1983). To deny certification, a court need not conclude that credibility problems would ultimately defeat the class representative's claim; rather, the court may deny class treatment if that unique defense is even arguably present. See Kline, 702 F.2d at 403 (district court need only make preliminary finding that representative's credibility would be subject to attack); J.H. Cohn, 628 F.2d at 998-999 (existence of arguable defense may bring adequacy of representation into question); Dubin v. Miller, 132 F.R.D. 269, 272 (D. Colo. 1990) (class certification should be denied if representative has substantial credibility issues). Here, Karnuth's credibility is open to serious question.

There are significant differences between the two complaints Karnuth has filed. The plain import of Karnuth's original pleading is that he never ordered any books -- that Rodale sent him the first book simply because Karnuth subscribed to one of Defendant's magazines. Thus, Karnuth

based this action on his allegation that “[a]t no time either before or after Defendant sent Plaintiff and the class the 2001 and 2002 unsolicited books did Plaintiff request or consent to the mailing or sending to him of the subject books.” (*Id.* at ¶ 24). Only after Defendant submitted evidence to Judge Van Antwerpen contradicting these allegations did Karnuth reinvent his claim, now arguing that “the crux of the case is whether the One Shot Order Card violates the applicable FTC regulations.” (Pl.’s Mem. at 6.). It is disturbing that even after Defendant and Judge Van Antwerpen noted significant factual discrepancies, Karnuth waited some fifteen months to move to amend his Complaint. Moreover, as alleged in the Amended Complaint, Karnuth actually paid for two of the three books he received from Rodale. (Amended Compl. at ¶¶ 10, 15).

Karnuth argues that his credibility is not in serious issue: he could not have known that he completed the order card in 2000 because he sent the card to Defendant and thus no longer had it in his possession. (Pl.’s Motion to Amend Complaint at 2). This is absurd. Karnuth was certainly in the best position to know his own actions. Yet, he brought this lawsuit, and based it on allegations he should have known were, at best, misleading. Moreover, the allegations will make it more difficult to prove key allegations on behalf of the proposed class. For instance, having paid for two of the three books Rodale sent him, Karnuth might well have difficulty convincing jurors that Rodale’s books were “unsolicited and unordered.” (Amended Compl. at ¶ 1). Karnuth may also have difficulty convincing a jury that he is a victim of Rodale’s “abuse and deception,” or that Rodale has “imposed unfair burdens on unsuspecting consumers.” (Amended Compl. at ¶ 1). In these circumstances, Karnuth’s credibility problems could certainly divert the jury’s “attention from the substance of the basic claim,” and thus harm “the remaining class members.” *Kline*, 88 F.R.D. at 700.

Karnuth's credibility problems are strikingly similar to those of the plaintiff in Savino, where the Court denied class certification. Savino v. Computer Credit, Inc., 173 F.R.D. 346 (E.D.N.Y. 1997) aff'd in part, vacated on other grounds, 164 F.3d 81 (2d Cir. 1998). There, the proposed class representative made inconsistent allegations in his complaint and amended complaint -- both brought under the Fair Debt Collection Practices Act. Id. at 348-49. The defendant argued that the plaintiff's inconsistent pleadings and deposition testimony created credibility problems that precluded him from adequately representing other class members. Id. at 353-357. The Court agreed, and denied class certification. Id. at 356 (stating "[t]he Court is concerned about this flip-flopping in the plaintiff's sworn testimony with regard to the crucial material facts in this case").

At oral argument, Plaintiff's counsel stated he would have no difficulty substituting another individual without Karnuth's credibility issues as class representative. (N.T., March 7, 2005 at 45:22-25). Accordingly, I deny the Motion to Certify without prejudice. Upon substitution of a new class representative, counsel may renew the certification motion. I will at that time consider the remaining arguments Defendant raises against certification.

An appropriate Order follows.

BY THE COURT:

Paul S. Diamond, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MICHAEL KARNUTH,	:	CIVIL ACTION
	:	
v.	:	NO. 03-742
	:	
RODALE, INC.	:	

ORDER

AND NOW, this 30th day of March, 2005, upon consideration of Plaintiff's Motion for Class Certification, Defendant's response, and all related submissions, it is ORDERED that Plaintiff's Motion for Class Certification is DENIED without prejudice. A new class representative shall be substituted within 14 days of the date of this Order. Failure to substitute the class representative will result in the denial of class certification with prejudice.

And is it so ORDERED.

PAUL S. DIAMOND, J.